NATARAJAN KUPPUSAMY, RE

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[BANKRUPTCY NO. D3-29-4693-90]
15 APRIL 1992

BANKRUPTCY: *Setting aside bankruptcy notice - Hearing of the application - Expiry of the statutory 7 days - Whether the Registrar may make extension of time - Whether an act of bankruptcy deemed to be committed before or until the disposal of the application - Receiving and adjudication order made before application to set aside a bankruptcy notice was heard - Validity of order.*

The bankruptcy notice was issued on 7 June 1990 and served on the applicant on 9 August 1990.

On 15 August 1990, that is before the expiry of the 7 days Natarajan filed an affidavit by which he sought to have the bankruptcy notice set aside.

On 19 January 1991, the petitioner purported to present its bankruptcy petition against Natarajan relying therein on the allegation that Natarajan had committed an act of bankruptcy in that he had failed to comply with the requirements of the notice of 7 June 1990.

The petition which was fixed for hearing on 17 July 1991, was served on the respondent on 2 April 1991.

The Registrar on being reminded of the omission to fix the date for the hearing of the application to set aside the bankruptcy notice, fixed the date of hearing of that application also for 17 July 1991.

On 17 July 1991, neither Natarajan nor his Counsel were present, the application to set aside was accordingly struck off.

Thereupon the petition was called for disposal and in the absence of Natarajan and his Counsel it was treated as an unopposed petition. Receiving and adjudication orders were made.

Counsel for the applicant argued that the Court ought not to have adjudged her client bankrupt because of the existence of the application to set aside the bankruptcy notice, r. 95(2) had the effect that it could not be said that an act of bankruptcy had been committed *vis-a-vis* the bankruptcy notice of 7 June 1990.

Counsel for the petitioner pointed out that although the Registrar did eventually fix a date for hearing of the application to set aside, she had not extended the time specified in the notice and accordingly as soon as the 7 days had expired, the debtor not having paid up as required by the notice had committed an act of bankruptcy on which the petition was found.

Held:

[1] In the face of the language used by r. 95(2) of the Bankruptcy Rules 1969, and the prevailing practice, where the r. 95(1) affidavit is filed before the expiry of the statutory 7 days given by the bankruptcy notice, the time for compliance of the notice is to be deemed to have been extended until the application has been heard and determined.

[2] Where before the period for compliance with a bankruptcy notice has expired the alleged debtor files a r. 95(1) affidavit - application, as no act of bankruptcy is deemed to have been committed until the disposal of the application, the filing of a petition before the disposal of the application purportedly grounded on non-compliance with the bankruptcy notice is invalid.

[3] Accordingly, the receiving and adjudication orders made on 17 July 1991 ought not to have been made having been made on a petition that the petitioner was not entitled to have presented.

[Receiving and adjudication orders annulled and rescinded. Costs of motion to be paid by petitioner. Each party to bear its own costs.]

Cases referred to:
Re Krishnamurthy Nagaratnam ex-parte Mayban Finance Sdn. Bhd. [1990] 2 CLJ (Rep) 282 ***(cit)***
Soh Bok Yew v. Cindee Dvpt. Sdn. Bhd. [1977] 1 MLJ 242 ***(cit)***
In re A Debtor [1953] WLR 1050 ***(cit)***

Legislation referred to:
Bankruptcy Act 1967, ss. 5, (1)(c), 105(1)
Banruptcy Rules 1969, rr. 95, (1), (2)

For the judgment debtor - R. Vasanthi; M/s. Ponmugam & Co.
For the judgment creditor/petitioner - S. Gunawathi; M/s. Nazri Aziz & Wong

JUDGMENT

VC George J:

By this motion the Court's power given by s. 105(1) of the Bankruptcy Act to annul the adjudication of the applicant a bankrupt is invoked by the bankrupt Natarajan a/l Kuppusamy.

The bankruptcy notice was issued on 7 June 1990 and served on the applicant on 9 August 1990. He was given 7 days excluding the day of service to pay up the RM547,355.77 demanded. On 15 August 1990, that is, before the expiry of the 7 days Natarajan filed an affidavit encl. (4) in the Court file by which he sought to have bankruptcy notice set aside. By r. 95 of the Bankruptcy Rules the filing of such an affidavit operates as an application to set aside the bankruptcy notice, and the Registrar is required by the Rules to fix a day for the hearing of the application which she appears to have, initially at least, overlooked doing.

On 19 January 1991, the petitioner purported to present its bankruptcy petition against Natarajan relying therein on the allegation that Natarajan had committed an act of bankruptcy in that he had failed to comply with the requirements of the said bankruptcy notice of 7 June 1990.

This petition which was fixed for hearing for 17 July 1991 was served on the respondent on 2 April 1991. It was only after the date for the disposal of the petition had been given did the Registrar on being reminded of the omission to fix a date for the hearing of the application to set aside the bankruptcy notice, fix the hearing of that application also for 17 July 1991.

When the application encl. (4) to set aside the bankruptcy notice was called for disposal on 17 July 1991, neither Natarajan nor his Counsel were present. It was accordingly struck off. Thereupon the petition was called for disposal and in the absence of Natarajan and his Counsel it was treated as an unopposed petition. Receiving and adjudication orders were made.

Cik R. Vasanthi, counsel for applicant in this motion now before me in effect submitted that the Court ought not to have adjudged her client bankrupt in that in her submission because of the existence of the application to set aside the bankruptcy notice, r. 95(2) had the effect that it could not be said that an act of bankruptcy had been committed *vis-a-vis* the bankruptcy notice of 7 June 1990.

The Rule is as follows:

95(1) The filing of an affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the Registrar shall fix a day for hearing the application, and shall give not less than three clear days' notice thereof to the debtor, the creditor and their respective solicitors, if known.

(2) If the application cannot be heard before the time specified in the notice for compliance with its requirements, the Registrar shall extend the time and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined.

Cik S. Gunawathi for the petitioner pointed out that although the Registrar did eventually fix a date for the hearing of the application to set aside, she had not extended the time specified in the notice and accordingly in her submission, as soon as the 7 days had expired, the debtor not having paid up as required by the notice had committed the act of bankruptcy on which the petition was founded. She referred to *Re Krishnamurthy Nagaratnam ex-parte Mayban Finance Bhd.* [1990] 2 CLJ (Rep) 282 in which case the learned Judge pointed out that although the application to set aside the bankruptcy notice had been filed before the expiry of the statutory 7 days there was no evidence that the applicant had applied for an extension of the 7 day period and there was no evidence that the Registrar had given any such extension. The learned Judge further went on to point out what in effect was that the application to set aside did not appear to have been pursued by the applicant which attitude of the applicant, it seems to me, influenced the learned Judge into holding as he did that it was too late for the applicant to complain that his application had not been heard.

Unlike the learned Judge in *Re Krishnamurthy Nagaratnam,* I had the benefit of having my attention drawn (by Tengku Muzani representing the Official Assignee) to the judgment of the Federal Court in *Soh Bok Yew v. Cindee Dvpt. Sdn. Bhd.* [1977] 1 MLJ 242 where the Federal Court in its judgment referred to a judgment of Harman J in *In re A Debtor* [1953] 1 WLR 1050 *(cons)* where at p. 1054 the learned Judge pointed out that the rule (equivalent to our r. 95(2)) is directory and compels the registrar to extend it (that is, the time given to the respondent to pay up what is demanded in the bankruptcy notice) until the application has been heard and determined. The Federal Court with reference to the case before it said that there had been several adjournments of the application by the Judge but that did not make any difference "because the Registrar has no choice and may be deemed to have made corresponding extensions of time for compliance with the notice."

I have made my own enquiries in respect of the current practice in our Courts and understand the position to be that the Registrars generally do not expressly extend the time that they are required to do by r. 95(2).

Accordingly I hold in the face of the language used by r. 95(2) and the prevailing practice, where the r. 95(1) affidavit is filed before the expiry of the statutory 7 days given by the bankruptcy notice, the time for compliance of the notice is to be deemed to have been extended until the application has been heard and determined.

Section 5(1) of the Bankruptcy Act provides that a creditor shall not be entitled to present a bankruptcy petition against a debtor unless among other things and as provided by s. 5(1)(c), an act of bankruptcy on which the petition is grounded has been committed within 6 months before the presentation of the petition. It follows that where before the period for compliance with a bankruptcy notice has expired the alleged debtor files a r. 95(1) affidavit-application, as no act of bankruptcy is deemed to be committed until the disposal of the

application, the filing of a petition before the disposal of the application purportedly grounded on non-compliance with the bankruptcy notice is invalid. The petitioner has to wait until the disposal of the application before filing the petition.

Accordingly the receiving and adjudication orders made on 17 July 1991 ought not to have been made having been made on a petition that the petitioner was not entitled to have presented.

It follows that prayer (1) of the motion encl. (14) is well founded. The orders made on 17 July 1991 are respectively annulled and rescinded. The costs of this motion will be paid by the petitioner. Since Natarajan did not oppose the petition when it was called, in respect thereof each party will bear its own costs.

As to the prayer 3 of the motion by which the applicant seeks damages, it is refused.

Also found at [1992] 3 CLJ 1638